Supreme Court, U.S.
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# In The
# Supreme Court of The United States
## October Term 1994

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**JEANETTE MARIE GILLIES GRYBOS,**
**MARIE JOSEPHINE GILLIES,**
***Petitioners,***

**v.**

**UNITED STATES DEPARTMENT OF STATE;**
**SECRETARY OF STATE**
**UNITED STATES DEPARTMENT OF JUSTICE;**
**UNITED STATES ATTORNEY,**
***Respondents.***

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**On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit**

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether 28 U.S.C. sec. 2401(b), which provides that: "[A] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues...." is tolled based upon wrongful conduct of the United States until the date of the last tortious act.

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**IN THE SUPREME COURT OF THE UNITED STATES**
OCTOBER TERM, 1994

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JEANETTE MARIE GILLIES GRYBOS
and
MARIE JOSEPHINE GILLIES, *Petitioners*,

*v.*

UNITED STATES DEPARTMENT OF STATE,
SECRETARY OF STATE,
and
UNITED STATES DEPARTMENT OF JUSTICE,
UNITED STATES ATTORNEY GENERAL,
*Respondents*.

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Jeanette Marie Gillies Grybos and Marie Josephine Gillies respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

**OPINIONS BELOW**

The opinion of the court of appeals (App., *infra*, 1a) is unreported. The opinion of the district court (App., *infra*, 2a-5a) is also unreported.

## JURISDICTION

The court of appeals entered its judgment on September 26, 1994 (App., *infra*, 6a). The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

## STATUTORY PROVISIONS INVOLVED

Title 28 U.S.C. sec. 2401(b) provides in relevant part that "[A] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues...."

## STATEMENT

Petitioners, both daughters of the late John St. Clair Gillies, a naturalized citizen of the United States, sued the Respondents in the United States District Court for the Northern District of Ohio, Eastern Division. Petitioners alleged that the respondents negligently revoked their citizenship, thereby depriving them of their rights of citizens without due process of law. In a previously filed case, John St. Clair Gillies, et. al., v. William French Smith, Case No. C82-505 (App., *infra*, ), filed in the Northern District of Ohio, Eastern Division, it was determined that John St. Clair Gillies was an American citizen at the time of his death and that the petitioners were also American citizens by derivative rights. In the present case, the respondents filed a Motion to Dismiss, alleging that the

limitations period for filing petitioner's claim had expired. The district court granted respondent's Motion to Dismiss. The court of appeals affirmed the district court's order without opinion.

### A. Facts Surrounding Petitioners' Case

In order to understand the proceedings in this matter it is necessary to have a grasp of an earlier related case, John St. Clair Gillies, et. al., v. William French Smith, et. al., case no. C82-505, filed in the United States District Court, Northern District of Ohio, in which petitioners, as plaintiffs, sued to have themselves declared citizens of the United States pursuant to Title 8 U.S.C. sec. 1503. In case number C82-505, the district court, based upon the testimony of Jeanette Marie Fillies Grybos, Marie Joseph Gillies and Anthony Grybos, and the exhibits admitted

into evidence at trial, entered judgment in favor of the plaintiffs and declared them to be citizens of the United States. The district court's order was entered on February 7, 1985.

In case number C82-505, the district judge found that petitioners' father, John St. Clair Gillies, was born in Australia on August 4, 1869, and that sometime between his birth and 1900 he moved to the U.S. and became a naturalized U.S.citizen. John St. Clair Gillies, after becoming a naturalized U.S. citizen, moved to the Philippines and worked as a teamster for the United States Quarter Master Department. After working in several other industries, John St. Clair Gillies became the owner and operator of a mining company.

At the trial of this previous case, the government stipulated to the fact that in order to obtain mineral and timber rights in the Philippines, a person had to

be a citizen of the Philippines or a citizen of the United States.

Petitioners were born in the early part of the 1900's in the family homestead in Sajor, Mankaya Province in the Philippine Islands. John St. Clair Gillies' mine was also located at the family homestead. In January, 1942, during World War II, petitioners were interned as prisoners of war by the Japanese, because they were American citizens. In 1943, petitioner Jeanette Marie Gillies Grybos was released from the internment camp. After her release she began working for the counter-intelligence unit of the 33rd Division of the United States Army.

Jeanette Grybos was employed as a civilian clerk, but due to her knowledge of the Philippine Islands she was able to supply valuable information regarding geography and enemy positions. She was also able to cross enemy lines with army

documents, and had, on several occasions, flown in army scout planes pointing out enemy positions to the U.S. Army.

At the conclusion of the war, petitioners traveled to the United States. At a hearing in 1945, before the officer in charge of U.S. Affairs for the Department of State in the Philippines, it was determined that petitioners were, in fact, American citizens. John St. Clair Gillies was a naturalized U.S. citizen and petitioners derived their citizenship through him. They were given identification badges and were allowed to enter the United States. The petitioners arrived in San Francisco, California, on January 6, 1946. In 1953, the Department of State revoked, without notice, its earlier finding that John St. Clair Gillies was an American citizen. On January 7, 1955 petitioners' application for certificates of citizenship was denied. On

August 2, 1979 the petitioners' application for certificates of citizenship was denied once again.

It was not until February 7, 1985, upon the strength of their formal complaint in the District Court, that petitioners were declared to be U.S. citizens.

**B. Proceedings Below**

On February 4, 1987, within two years of the district court's determination that petitioners were, in fact, American citizens, they filed an administrative claim with the United States Department of State. In this claim, the petitioners alleged that as a result of the State Department's negligence in revoking their citizenship in 1953, they were deprived of their father's mining rights. The deprivation was a result of the fact that only citizens of the United States or of the Philippines could acquire such rights.

The petitioners demanded damages in the amount of one hundred million dollars ($100,000,000.00).

On October 7, 1991 the Department of State, by letter, denied petitioners' claim.[1] On April 3, 1992, within six months of the administrative decision, petitioners filed a complaint in the United States District Court, Northern District of Ohio, Eastern Division.

On June 8, 1992, respondents filed a Motion to Dismiss alleging that petitioners' claim had accrued in 1953 and that the instant lawsuit was barred by the applicable statute of limitations.

On February 18, 1993, the magistrate judge issued a report and recommendation that respondent's Motion to Dismiss be granted. On July 8, 1993 the district

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[1] The government alleged that the letter had been sent on October 2, 1991. However, the lower court correctly ruled that the mailing did not occur until October 7, 1991 the date of the post mark.

court accepted the magistrate judge's recommendations and granted respondent's Motion to Dismiss. On September 26, 1994, the Court of Appeals for the Sixth Circuit affirmed the decision of the district court.

**REASONS FOR GRANTING THE PETITION**

The Sixth Circuit failed to adopt petitioners' position that respondent's actions constituted a continuing tort and that petitioners' claim did not accrue until the date of the last tortious act, February 7, 1985. At the district court level conflicting decisions, over when a cause of action accrues, are proliferating rapidly, and the need for guidance from this Court is acute. This case is a rare and timely opportunity to provide that guidance, since there are systemic reasons why few of the district court decisions receive appellate review. Moreover, the

decision below is erroneous, and the issue that it addresses is important.

## I. The Decision of the Court of Appeals is Erroneous

Ordinarily, a claim accrues under the Federal Tort Claims Act when a claimant learns of his injury and its cause. United States v. Kubrick, 444 U.S. 111, 100 S. Ct. 352 (1979). Title 28 U.S.C. sec. 2401(b) provides a limitations period for claims under the Federal Tort Claims Act, and this section provides, in relevant part, that "[A] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate federal agency within two years after such claim accrues...." However, an exception to the general rule exists when a defendant's conduct constitutes a "continuing tort". Gross v. United States, 676 F. 2d 295, 300 (8th Cir. 1982),

Maslauskas v. United States, 583 F. Supp.349 (D. Mass. 1984).

Under the theory of a continuing tort, the statute of limitations does not begin to run until the wrong is over and done with. Taylor v. Merrick, 717 F. 2d 1112 (7th Cir. 1983), Manildra Mill Corp. v. Ogilvie Mills, Inc., 723 F. Supp. 567 (D. Kan. 1989), reconsidered in part 746 F. Supp. 40. Moreover, in Airweld, Inc., v. Airco, Inc., 742 F. 2d 1184 (9th Cir. 1984), *cert.* denied 105 S.Ct. 1184. The court held that the effect of a continuing violation is to restart the statute of limitations. Finally, in Baker v. U.S., 614 F. 2d 263, 222 Ct.Cl. 263 (Ct. Cl. 1980) the court held that a claim against the United States accrues on the date when all the events have occurred which frees the liability of the United States and entitle the claimant to institute an action thereon. See also United States v.

Andersen, 269 U.S. 422, 46 S.Ct. 131 (126).

In the case at hand, petitioners' cause of action did not accrue for purposes of the Federal Tort Claims Act until February 7, 1985, the day in which they were determined to be citizens, despite the contention of the respondents that they were not. The course of conduct employed by respondents in denying petitioners their citizenship rights from 1953 until February 7, 1985 constituted a continuing tort which operated to restart the statute of limitations each and every day in which petitioners' rights as citizens were abridged. As such, this Court should grant petitioners' petition to give guidance to the lower courts and to correct the Sixth Circuit's error.

## II. The Question Presented is Important

In his annual message to Congress in 1861, President Lincoln stated that, "It is

as much the duty of government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals."

Petitioners in this case, especially Jeanette Marie Gillies Grybos, have done much to insure that the basic liberties we all enjoy as citizens have been preserved.

While in the Philippines during World War II, she risked her life numerous times to insure that these liberties remained intact. Now, all petitioners' are asking is that the liberties they worked so hard to preserve will be enforced to insure that prompt justice be rendered in their favor against the United States. Prompt justice demands that this Court review the decision of the Sixth Circuit, overturn their erroneous decision, and afford petitioners their day in Court. Therefore, the Court should grant this petition.

## CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

No. _____

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**In The**
**SUPREME COURT OF THE UNITED STATES**
October Term, 1994

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Jeanette Marie Gillies Grybos
Marie Josephine Gillies, *Petitioners*,

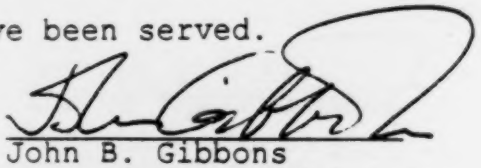
*v.*

United States Department of State;
Secretary of State,
United States Department of Justice;
United States Attorney General,
*Respondents*.

---

I, John B. Gibbons, a member of the bar of this Court, hereby certify that on this 23rd day of December, 1994, three copies of this writ of certiorari in the above-captioned case were mailed, first class postage prepaid, to Emily Sweeney, United States Attorney, 1800 Bank One

Center, 600 Superior Ave., Cleveland, Ohio 44114, counsel for Respondents herein. I further certify that all parties required to be served have been served.



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**In The**
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**On Petition For A Writ Of Certiorari**
**To The United States Court of**
**Appeals For The Sixth Circuit**

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**APPENDIX**

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JEANETTE MARIE GILLIES GRYBOS, et al.,
Plaintiffs,

v.

U.S. DEPARTMENT OF STATE,
SECRETARY OF STATE,
Defendant.

CASE NO. 4: 92CV00687

Chief Judge Thomas D. Lambros

REPORT & RECOMMENDATION

Magistrate Judge Charles R. Laurie

## I. INTRODUCTION

On May 22. 1992, Chief Judge Thomas D. Lambros issued an order referring this matter to this Magistrate Judge for pretrial supervision pursuant to 28 U.S.C. §636(a) and Local Rules 5:1.1(b) and (e). The following constitutes this Magistrate Judge's report and recommended disposition on the government's motion to dismiss the plaintiffs' complaint

for lack of subject matter jurisdiction.

## II. HISTORY

### A. Statement of the Facts

Sisters Jeanette Marie Gillies Grybos (hereinafter "Grybos") and Marie Josephine Gillies (hereinafter "Gillies"), the plaintiffs herein, claim that their father, John St. Clair Gillies (hereinafter "John Gillies"), was a naturaiized American citizen whose citizenship was negligently canceled by the United States Department of State (hereinafter "State Department") in 1952.

Because the plaintiffs' American citizenship and citizenship rights derive from their father's citizenship, they claim they were injured by the consequent deprivation of: (1) the inheritance of their fathers mining rights in the Philippines (one must be an American or Filipino citizen to inherit mining rights in the Philippines); (2) their rights as American citizens to travel outside the country; and (3)

their basic citizenship rights inside the United States.

The United States District Court for the Northern District of Ohio determined in 1985 in a separate lawsuit that John Gillies was a naturalized citizen of the United States and the plaintiffs, Grybos and Gillies, therefore were also United States citizens. See Exhibit A to the government's motion to dismiss (memorandum opinion from Gillies v. Smith, No. C82-505 (N.D. Ohio, Feb. 7, 1985) (hereinafter "Government's Exhibit A"). The following statement of facts is based in large part on that court's findings of fact.[1]

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[1]The facts alleged in the plaintiffs' complaint are based almost entirely on the 1985 findings of the Gillies v. Smith court. This Magistrate Judge perceives no reason to avoid relying on that court's findings in outlining the facts for this case, because neither the plaintiffs nor the defendant have voiced any objections to those findings of fact.

John Gillies was born in Australia in 1869. Some time between his birth and 1900, John Gillies moved to the United States, became a naturalized citizen, then moved to the Philippine Islands. He worked as a teamster for the United States Quartermaster Department in the Philippines from December 1, 1900, until June 22, 1901. Eventually, John Gillies became the owner and operator of a mining company in the Philippines.

John Gillies married Emilia Minay Hernandez in the Philippines in 1918. The plaintiffs in this suit are two of the seven children born to that union. The plaintiffs made their home at the Gillies' family homestead in Suyoc, Makayan Province, Philippine Islands. John Gillies' mines were also located at the homestead.

When World War II erupted, Japanese forces took possession of the Philippine Islands. The Japanese converted Santo Tomas University in Manila into an

internment camp. In January, 1942, the Japanese interned plaintiff Grybos, her older sister Katherine and their father, John Gillies, at the Santo Tomas camp, apparently because they were American civilians. John Gillies was released from the internment camp in the summer of 1942, and taken to a hospital where he died several days later on August 7, 1942. After John Gillies died, the Japanese kept his passport and other papers identifying him as an American citizen.

The Japanese released Grybos from the internment camp in 1943. In late 1945, following the conclusion of the war, the plaintiffs determined to move to United States. The State Department official in charge of U.S. Affairs in the Philippines held a hearing to decide whether the plaintiffs were American citizens, and so could enter the United States. At the hearing, plaintiffs presented affidavits by persons with personal knowledge that John Gillies was

an American citizen, and that the plaintiffs were his children. On October 16, 1945, the State Department sent a telegram to the American Consul in the Philippines stating that U.S. passports had been issued in 1928 and 1934 for a John Gillies who was born in Scotland and naturalized in 1915 -- apparently a different John Gillies from the plaintiffs' father. Nevertheless, on December 19, 1945, the plaintiffs were granted permission to enter the United States as citizens. The plaintiffs arrived in the United States on January 6, 1946. Grybos married and moved to Youngstown, Ohio, in 1947, where she still resides.

Problems with the plaintiffs' citizenship status became apparent almost immediately. In a letter to Grybos on October 28, 1952, the State Department refused to issue a passport to her brother, William Gillies. See Exhibit B to government's motion to dismiss (letter from State Department to Jeanette M. Gillies Grybos of October 28,

1952) (hereinafter "Government's Exhibit B"). The State Department based its decision on the fact that it had used a file on another John Gillies to admit plaintiffs into the United States in 1945. Id. The letter further stated that the State Department was unable to find any passport records on the John Gillies involved here. Id. The letter suggested that if the plaintiffs were admitted to the United States on the basis of erroneous information, they should take early steps to clarify their citizenship status with the Immigration and Naturalization Service (hereinafter "INS"). Id. Moreover, the Department offered to present the matter to the INS for them. Id.

The government thereafter continued to deny plaintiffs' American citizenship because the plaintiffs could not produce proof that their father was a naturalized American citizen. The State Department refused to issue Grybos a passport in 1952. On January 7, 1955, the INS

denied Grybos' application for a certificate of citizenship. The State Department again refused to issue Grybos a passport in 1976. Finally, on August 2, 1979, the INS denied certificates of citizenship to both Grybos and Gillies.

In 1982, Grybos and Gillies filed action No. C82-505 in federal district court under U.S.C. § 1503 and 28 U.S.C. §§ 1331, 1343, and 1346, seeking a declaration as to their citizenship status. The court held a trial in this matter on January 28, 1985. Based on secondary evidence and witness testimony, the court found that John Gillies was a naturalized American citizen at the time of his death. Consequently, John Gillies' children acquired derivative citizenship through him. Accordingly, the court declared Grybos and Gillies United States citizens in a memorandum opinion dated February 5, 1985.

**B. Procedural History**

In February, 1987, the plaintiffs filed separated

claims with the State Department under the Federal Tort Claims Act (hereinafter "FTCA"), 28 U.S.C. §§ 1346 and 2671-80, seeking damages for the deprivation of their rights as United States citizens beginning in 1953. See Exhibit A to the plaintiffs' complaint (letter from the State Department to Frank J. McNally, Esq., of October 2, 1991) (hereinafter "Plaintiffs' Exhibit A"). The State Department denied their claims by letter dated October 2, 1991, on the ground that they were time-barred. Id. Plaintiffs filed this lawsuit against the State Department on April 3. 1992.

On June 8. 1992, the government filed two motions which are the subjects of this report: first, a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b) (1), and second, a motion for leave to file a supplemental motion to dismiss pursuant to 28 U.S.C. § 2680. After obtaining an extension of time to answer, the plaintiffs filed their brief in opposition to the government's

motions to dismiss and for leave to file supplemental motion to dismiss on July 22, 1992 (hereinafter "Opposition Brief").

Solely for purposes of deciding the government's motion, this Court notes that jurisdiction for this action is properly invoked under 28 U.S.C. § 1346 (the complaint in this case inadvertently stated that jurisdiction of the court was established under 28 U.S.C. § 2401(b)).

## III. MOTION TO DISMISS

### A. Standard for determining motion to dismiss

[It is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.

"...[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). In this case, the government seeks dismissal of the plaintiffs' negligence claim on the basis that the court lacks subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. The court must construe the allegations in the complaint most favorably to the plaintiffs. Furthermore, the complaint must not be dismissed unless, beyond a doubt, the plaintiffs cannot succeed in prosecuting their claims. Scheuer, 416 U.S. at 236.

**B. Statute of limitations**

The government bases its motion to dismiss on the time limit for bringing action under the FTCA set forth in 28 U.S.C. § 2401, which states in pertinent part:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after

such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2401(b). The government contends that the plaintiffs' FTCA action is barred, and therefore this Court lacks subject matter jurisdiction, because the plaintiffs' tort claim against the State Department was not filed with the appropriate agency within two years after it accrued. [2]

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[2]The defendant also makes the argument, in a footnote to its motion to dismiss, that the plaintiffs' claim is time-barred even if it was timely file with the appropriate agency, because the suit was not filed in this court within six months of the notice of the agency finding. Motion to dismiss at 9. The plaintiffs point out in their brief in opposition that while the agency's letter notifying them of the denial of their claim was dated October 2, 1991, it was not mailed until October 7, 1991. Brief in Opposition at 5-6. The Plaintiffs also attach copies of the letter and the envelope bearing the postmark of October 7, 1991. See Exhibits A

The primary question in this suit is when the plaintiffs' claim against the State Department for the allegedly negligent cancellation of their citizenship accrued. Plaintiffs argue that their cause of action did not exist, and therefore their claim did not accrue, until the plaintiffs' citizenship was established by the federal district court in 1985. The plaintiffs further claim that they lacked the necessary standing until the district Court's 1985 order.[3]

On the other hand, the defendant argues that the

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and B to the Brief in Opposition. The Plaintiffs filed this suit on April 3, 1992.

Because the statute refers to the date of mailing of the notice of denial, and the evidence clearly reflects that this suit was initiated within six months of the mailing date of October 7, 1991, the defendant's footnoted argument is without merit.

[3]To the best of the Magistrate Judge's ability to ascertain, there is no requirement in the FTCA that a party must be an American citizen in order to have a standing to file a suit under that statute.

plaintiffs' claim accrued, and that statute of limitations began to run, when the State Department invalidated the plaintiffs' U.S. citizenship in 1952. This Magistrate Judge is inclined to agree.

The United States Supreme Court specifically addressed the issue of when claims accrue under the FTCA in United States v. Kubrick, 444 U.S. 111 (1979). The general rule under the FTCA is that a tort claim accrues at the time of the plaintiff's injury. Id. at 120. The Court ruled in Kubrick that the time of accrual under § 2401(b) is a factual determination, not a legal one. Id. at 122. A claim accrues when the plaintiff ascertains two "critical facts" about his or her injury: (1) the fact that the plaintiff was injured; and (2) who inflicted the injury. Id. Armed with these facts, the Court reasoned, a plaintiff could protect himself or herself by seeking legal or other appropriate advice. Id. at 122-24.

The Court held that for statute of limitations purposes, the plaintiff's ignorance of his or her legal rights does not toll the accrual of his or her claims. Id. at 122. Congress did not intend for accrual of a claim to await the plaintiff's awareness that his or her injury was negligently inflicted, i.e., the plaintiff's discovery that he or she has a legal claim. Id. at 123. Although Kubrick was a medical malpractice case, the Court took pains not to confine its holding to medical malpractice claimants. Id. at 124. Once the critical facts are ascertained, the Court stated, a "malpractice plaintiff must determine within the period of limitations whether to sue or not, which is precisely the judgment that their tort claimants must make." Id. (emphasis added).

In the Kubrick case, doctors at a Veterans Administration (hereinafter "VA") hospital used neomycin to treat the plaintiff's infected leg in 1968. He suffered a

hearing loss soon after. It was not until January, 1969 that a hearing specialist informed the plaintiff that his hearing loss was probably caused by the neomycin administered at the VA hospital. The Court found that the plaintiff's claim accrued in January of 1969, because the plaintiff became aware at that time of both the fact of his injury and who had injured him. Id. at 123. That plaintiff did not file suit against the government until after he learned in June of 1971 that the neomycin was negligently administered. By that time more than two years had elapsed since the plaintiff's claim accrued, notwithstanding when he learned of the VA doctors' negligence. The Court held that the claim was therefore barred by the statute of limitations under § 2401(b). Id. at 117-25.

The plaintiffs here maintain that their claim did not accrue at the time of the allegedly negligent cancellation of their father's citizenship. However, the Sixth Circuit Court

of Appeals has stated that a tort claim accrues at the time of the tortious event when greater than de minimis harm is discernable. Hicks v. Hines, Inc., 826 F.2d 1543, 1544 (6th Cir. 1987). The harm plaintiffs claim to have suffered was significant and discernable at the time their father's citizenship as canceled. The State Department informed Grybos by letter dated October 28, 1952, of the revocation of her father's American citizenship. See Government's Exhibit B. The letter stated that as a consequence, the plaintiffs had been erroneously admitted into the country in 1946, and recommended that they take "early steps" with the INS to clarify their citizenship status. Id.

By the same letter, the State Department rejected the application of the plaintiffs' brother for an American passport. Id. That same year the State department denied Grybos' application for a passport. See Government's Exhibit A at 8 (Grybos was denied a passport in 1976 as

well). As plaintiffs allege in their complaint, denial of passports prevented them from leaving the country and kept them from their relatives in the Philippines. See Complaint at 4. This harm, for which the plaintiffs only now bring suit, was both significant and discernable at the time the State Department canceled their father's citizenship.

Regarding the other damages alleged in this suit, the record does not indicate when plaintiffs realized they were deprived of their inheritance, or their "basic rights," because of the lack of American citizenship. However,"[e]ven if 'the plaintiff later discovers that his injuries are more serious than he originally thought, his cause of action nevertheless accrues on the earlier date, the date he realized that he had sustained harm from the tortious act.'" Hicks v. Hines, Inc., 826 F.2d 1543, 1544 (6th Cir. 1987) (quoting Albertson v. T.J. Stevenson & Co., Inc., 749 F.2d 223, 229 (5th Cir. 1984)). Irrespective of when the

plaintiffs became aware of these deprivations, they certainly knew they had sustained some discernable harm when their father's citizenship was canceled.

The District Court for the District of Columbia face a similar to this one in Hohri v. United States, 586 F. Supp. 769 (D.D.C. 1984), aff'd in part, rev'd in part on other grounds, 782 F.2d 227 (D.C. Cir. 1986), vacated, 482 U.S. 64 (1987), aff'd, 847 F. 2d 779 (Fed. Cir. 1988) (per curiam) (affirming in its entirety district court's 1984 holding). Hohri was a suit for damages brought in 1983 by survivors of this country's internment of Japanese-Americans during World War II. The plaintiffs there argued that because the Supreme Court had ruled in Korematsu v. United States, 323 U.S. 214 (1944), that the evacuation of Japanese-Americans was a military necessity, it would have been futile for them to bring their suit at the time of their injury, in the 1940's. 586 F.2d at 787. They

also claimed that new information became available in 1982 that had not been available in the 1940's. Id. The Hohri Court granted the government's motion to dismiss the plaintiffs' complaint, and held that the plaintiffs had all the necessary information to file their suit in the 1940's, because they knew that had been injured, and who had injured them. Id. at 788. The Court also note that while it is difficult to win a suit in the face of opposing Supreme Court precedent, it is not impossible. Id.

The situation in this case is almost identical to that in Hohri. The Plaintiffs here have known the essential facts about their injury for approximately forty years, but have waited for an additional clarification of their claim, i.e., the Courts ruling in Gillies v. Smith that their father was a naturalized American citizen, and they were therefore American citizens as well, before filing their claim. While the Court's ruling in Gillies v. Smith is helpful in clarifying

the issues in this case, it was not a necessary predicate to the plaintiffs' filing this suit.

Plaintiffs cite United States v. One 1961 Red Chevrolet Impala Sedan, 457 F.2d 1353 (5th Cir. 1972), to support their argument that they lacked a right to enforce their cause of action prior to the establishment of their American citizenship in 1985. See Opposition Brief at 2. In Red Chevrolet, the claimant to previously forfeited property filed suit, demanded the return of the property on the basis of an intervening Supreme Court case, which held such forfeiture was improper. The Fifth Circuit Court of Appeals held that the claimant had lacked a cause of action until the Supreme Court decided the intervening case. Red Chevrolet, 457 F.2d at 1358. Therefore, the claim did not accrue until the date of the intervening case, and the claimant's suit was timely filed on that basis. Id.

The case at bar is distinguishable from Red

Chevrolet in several crucial respects. The limited right to sue the United States in tort was established by Congress with enactment of the FTCA in 1949. The FTCA does not require that one be an American citizen to sue the government under any of the provisions applicable to this case. Furthermore, the federal district court holding in Gillies v. Smith in 1985 as to plaintiffs' citizenship status did not establish a new cause of action, nor did it assert that the State Department's 1952 revocation was improperly determined. Rather, that court simply declared the plaintiffs' father to be a United States citizen. Red Chevrolet has no bearing on this case.

The court in Red Chevrolet also asserted that the time accrual must be interpreted in light of the general purposes of the limitations statute and the practical ends to be served by the limitation of actions. Red Chevrolet, 457 F.2d at 1358. The purpose of § 2401(b) "is to encourage

the prompt presentation of claims" against the government. Kubrick, 444 U.S. at 117. In practical terms, it "protect[s] the defendant[ ] and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." Id. Those purposes would not be especially well-served by allowing this case to go forward forty years after the operative facts occurred.

The alleged negligent cancellation of John Gillies' American citizenship took place over forty years ago. Neither the government nor the plaintiffs have produced any documentary evidence of John Gillies' naturalization. Even if documentary evidence exists, it will be very difficult to find after the lapse of years. Moreover, much of the evidence in this case may exist only in the memories of witnesses whose recollection of relevant events could have

faded significantly by now. Based on the foregoing reasons, this Magistrate Judge believes that the search for truth in this case would be seriously impaired by the lapse of time since the events at the heart of this case occurred. Maintaining this action would defeat the purpose of and the protection afforded by § 2401(b).

Plaintiffs also argue that the statue of limitations should be tolled on the basis of the diligence-discovery rule. They cite Barrett v. United States, 689 F.2d 324 (2d Cir. 1982), cert. denied, 462 U.S. 1131 (1983), for this proposition. See opposition Brief at 3-4. The diligence-discovery rule postpones accrual until the plaintiff has or with reasonable diligence should have discovered the critical facts of his or her injury. Barrett, 689 F.2d at 327.

In Barrett, plaintiff's decedent died in the early 1950's from a lethal injection of a toxic drug during treatment at a state psychiatric hospital. In 1975, the

Secretary of the Army revealed that plaintiff's decedent received the lethal injection while he unknowingly served as a test subject in an Army chemical warfare experiment.

The plaintiff in Barrett did not sue for negligent administration of the drug; rather, she sued the government for negligent creation of the testing program and conspiracy to cover up the facts surrounding the decedent's death. The Court found the plaintiff could not have discovered the fact of the cover-up until the Army's disclosure in 1975. Id. the government's concealment tolled the statute of limitations, such that the claim did not accrue until 1975. Id.

In contrast, the plaintiffs here are suing for damages arising from the State Department's cancellation of their father's naturalization. Plaintiffs became aware of that fact, and the immediate consequences, in 1952. Plaintiffs further claim that the government denied them information

necessary to determine their claim. See Opposition Brief at 4. The only new information apparent from their complaint and Government's Exhibit A is that plaintiffs' father was in fact a naturalized citizen. Unlike Barrett, their father's naturalization was not a fact concealed by the State Department, but a fact determined by the federal district court. Barrett provides no support for the plaintiffs' position.

Plaintiffs further cite Attallah v. United States, 758 F. Supp. 81 (D.P.R. 1991), aff'd, 955 F.2d 776 (1st Cir. 1992), for authority to postpone accrual of their claim from 1952 to 1985. See Opposition Brief at 4. In Attallah, plaintiffs' courier was robbed and murdered in 1982, but the plaintiffs did not find out until almost five years later that two U.S. customs agents were responsible for the crime. The Plaintiffs in Attallah subsequently sued the government under the FTCA for the actions of the two

agents. The Untied States District Court for the District of Puerto Rico held that the late discovery of this critical fact had tolled the accrual of plaintiffs' claim. Attallah at 83-84 (citing Kubrick as the basis for its holding.

In contrast, the plaintiffs in this case were aware in 1952 that the State Department committed the act of which they now complain. Attallah does not apply to the case at bar because these plaintiffs knew who harmed them at the time they were harmed.

As the complaint in this case reveals, the plaintiffs were aware in 1952 that they had been denied the rights appurtenant to citizenship, for which injury they now sue. Unquestionably, plaintiffs knew that the State Department had made that determination. Accordingly, the plaintiffs in this case knew: (1) that they had been injured, and (2) who had injured them, at the time of the allegedly tortious act. Under Kubrick, the plaintiffs' tort claim under the FTCA

accrued when they ascertained these two critical facts. Even construing the allegations in the complaint most favorably to the plaintiffs, this Magistrate Judge believes that the plaintiffs' claim accrued in 1952, and the two year time limit for filing a claim with the relevant agency under the FTCA expired in 1954. Consequently, this Magistrate Judge respectfully recommends that the court grant the government's motion to dismiss for lack of subject matter jurisdiction.

## IV. MOTION FOR LEAVE TO FILE SUPPLEMENTAL MOTION TO DISMISS

The Court must consider the government's motion to leave to file a supplemental motion to dismiss only if the Court denies the government's motion to dismiss for lack of subject matter jurisdiction. This Magistrate Judge therefore does not address this supplemental filing pending the court's decision on the original motion. If the court grants the

motion to dismiss, the supplemental motion will be moot, and should be dismissed as such. If the court denies the motion to dismiss, the supplemental motion will remain pending, and will subsequently require a ruling on its merits.

## V. CONCLUSION

For the foregoing reasons, this Magistrate Judge finds, and respectfully recommends to the court, that the government's motion to dismiss plaintiffs' tort claim should be granted, because plaintiffs' claim accrued in 1952 and the 2 year time limit for filing a claim under the FTCA expired in 1954.

DATED: February 18, 1993

CHARLES R. LAURIE
UNITED STATES MAGISTRATE

## VI. OBJECTIONS

Any objections to this Report and Recommendation must be filed with the Clerk of the Courts within ten (10) days of receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order. See United States v. Waiters, 638 F.2d 947 (6th Cir. 1981). See also Thomas v. Arn, 474 U.S. 140 (1985), reh'g denied, 474 U.S. 1111 (1986).

## VII. CERTIFICATION

I hereby certify that a copy or the foregoing instrument has been forwarded to Frank J. McNally, attorney for plaintiff, 19800 Center Ridge Road, Rocky River, Ohio, 44116 and Alex Rokakis, Assistant U.S. Attorney, 1800 Bank One Center, 600 Superior Avenue, East, Cleveland, Ohio, 44114-2600 this 18th day of February, 1993, by regular United States Mail.

Charles R. Laurie
United States Magistrate Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

JEANETTE MARIE GILLIES GRYBOS, et al.,

Plaintiffs,

v.

DEPARTMENT OF STATE, SECRETARY OF STATE,

Defendant.

CASE No. 4:92CV00687

ORDER

THOMAS D. LAMBROS, CHIEF JUDGE

On April 3, 1993, plaintiffs commenced this suit for damages against defendants pursuant to 28 U.S.C. §§ 1346 and 2671-80. Plaintiffs allege, among other things, deprivation of their rights as citizens of the United States. On May 22, 1992, this Court referred this matter to Magistrate Judge Charles R. Laurie for pretrial supervision pursuant to 28 U.S.C. § 636(a). Subsequently, defendant

filed amotion to dismiss for lack of subject matter jurisdiction and a separate motion for leave to file a supplemental motion to dismiss. Plaintiffs filed a brief in opposition to both motions. In his Report and Recommendation, issued February 18, 1993, Magistrate Judge Laurie recommended that this Court grant the defendant's motion to dismiss because plaintiffs' claim accrued in 1952 and the two year period for a suit brought under the Federal Tort Claims Act has expired in 1954.

On March 25, 1993, this Court granted plaintiffs' request for an extension of time to file objections to Magistrate Judge Laurie's Report and Recommendation. After the time requested by plaintiffs expired, plaintiffs requested an additional extension of sixty (60) days to file objections because plaintiffs needed exhibits from a file located in Chicago. This Court granted plaintiffs an extension until May 0, 1993, to file objections. Plaintiffs filed the objections and requested time to file further

objections, and defendant filed a reply to said objections.

This court finds that Magistrate Judge Laurie correctly and thoroughly set forth the relevant adjudicative facts in this case; it is therefore unnecessary to reiterate all of them here. In essence, plaintiffs' complaint alleges that in 1952 the Department of State negligently canceled as earlier finding that plaintiff's father was a U.S. citizen and this cancellation deprived plaintiffs of their derivative rights to citizenship without due process of law. As a result of defendant's actions, plaintiffs seek damages of one hundred million dollars (100,000,000.00) for the loss of mineral rights in the Philippines and loss of basic citizenship from 1952 to 1985.[1]

Plaintiffs' objections for the most part reiterate their arguments set forth in the original brief in opposition to the motion to dismiss. The crux of plaintiffs' argument is that

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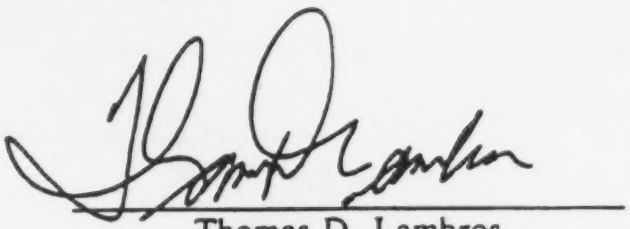
[1]In 1985, plaintiffs were declared citizens. John St. Clair Gillies v. William French Smith, C82-505 (N.D. Ohio Feb. 7, 1985).

they were precluded from filing suit under the Federal Tort Claims Act because they lack standing. This court is unable to find support for plaintiffs' contention that they had to be declared citizens before they had standing to file suit under he Federal Tort Claims Act. Clearly, plaintiffs had notice of the harm in 1952 when the citizenship of plaintiffs' father was revoked, and the failure to file suit within the time period permitted bars the filing of this suit.

This court has reviewed the record in this case and finds that the Magistrate Judge addressed the issues raised in plaintiffs' brief in opposition to the motion to dismiss and the objections to the Report and furthermore, applied the relevant and correct legal standards. For this reason, Magistrate Judge Laurie's Report and Recommendation is, therefore, adopted and fully incorporated herein. In accordance with this finding, defendant's motion to dismiss is hereby granted and the request for leave to file further objections to the Report and Recommendation is likewise

denied. Accordingly, this matter is dismissed and terminated.

IT IS SO ORDERED.



Thomas D. Lambros
Chief Judge
United States District Court

AT CLEVELAND, OHIO

DATED: 7/8/93

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

JEANETTE MARIE GILLIES GRYBOS, et al.,

Plaintiffs,

v.

DEPARTMENT OF STATE, SECRETARY OF STATE,

Defendant.

CASE No. 4:92CV00687

JUDGEMENT

THOMAS D. LAMBROS, CHIEF JUDGE

In accordance with the Order of this dated, defendant's motion to dismiss is hereby granted, and accordingly, this action is hereby dismissed and terminated.

IT IS SO ORDERED.

Thomas D. Lambros
Chief Judge
United States District Court

AT CLEVELAND, OHIO

DATED: 1/8/93

Case No: 93-3976

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**
**ORDER**

JEANETTE MARIE GILLIES GRYBOS; MARIE JOSEPHINE GILLES
Plaintiffs - Appellants

v.

UNITED STATES DEPARTMENT OF STATE, SECRETARY OF STATE; UNITED STATES DEPARTMENT OF JUSTICE; UNITED STATES ATTORNEY
Defendants - Appellees

BEFORE: MARTIN and BOGGS, Circuit Judges; and FORESTER, District Judge*

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof.

It is ORDERED that the judgement of the district court be, and it hereby is, affirmed for the reasons stated in the oral opinion from the bench.

ENTERED BY ORDER OF THE COURT

Leonard Green

Leonard Green, Clerk

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* The Honorable Karl S. Forester, United States District Judge for the Eastern District of Kentucky, sitting by designation.

THE UNITED STATES COURT OF APPEALS
THE SIXTH CIRCUIT

TRANSCRIPT OF PROCEEDINGS
ANNOUNCEMENT OF ORAL OPINION

- - - -

JEANETTE GRYBOS, ET AL.,
versus
UNITED STATES DEPARTMENT OF STATE, ET AL.
CASE NO. 93-9376

- - - -

On September 23, 1994

- - - -

APPEARANCES:

Judge Martin, Judge Boggs & Judge Forester

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Jeffrey J. Rager, RPR,
Official Court Reporter
Cuyahoga County, Ohio

September 23, 1994
PROCEEDINGS

JUDGE MARTIN: As we have stated earlier and now, it's the policy of our Court, on occasions where the case represents relatively minor precedential value, but where the parties are entitled to hear the reasoning for our decision, we render that decision after oral arguments, after we have had a chance to ask questions and inquire as to the issues that we see remaining after we prepared for oral argument.

In this case, such is the occasion, and I'll call on my colleague, Judge Boggs, to render judgement on behalf of the Court.

JUDGE BOGGS: The fundamental issue in this case is when the statute of limitations began to run.

As indicated in our discussion, the normal rules for a running of the statute of limitations os when you knew

there was a -- when the injury occurred and, at most, when you knew who the source of the injury was.

There's no question that all of those standards were met in 1951.

There's no question that there was no concealment in the way that cases have held that sometimes lead to tolling in terms of a concealment of the role of the putative defendant of a concealment of the fact of the injury.

Here, even taking the most extravagant view that there was anything that could be called concealment, it was only of evidentiary facts, and the cases do not hold that the statute of limitations can be tolled because of the misapprehension of evidentiary facts.

The only case that really comes close to providing a defendant with any comfort is a case called United States versus One 1961 Red Chevrolet, which is a Fifth Circuit case, which held that when there was a ruling of a higher court that created a new cause of action, as a matter of law,

that started the statute of limitations because there wasn't a cause of action to sue on until that time.

That case has proven somewhat dormant in the law. I couldn't find it having been followed. But even if we took that case as the authority, that's not what we have here.

There was no change in an over-arching rule of law. There was, at most, a change in the ruling as a factual matter ultimately by the U.S. District Court under Judge Dowd, which properly granted the plaintiffs their citizenship.

The Ahori case, in a much more horrific circumstance in the case of the Japanese internments, found that the statute of limitations began to run under conventional principles when the defendants--the plaintiffs there were interned, even though, as a matter of fact, they didn't have a chance of a snowball of winning their suit at that time.

Therefore, under these circumstances, the statute of limitations for the plaintiffs here began to run in 1952. It had run long, long before the claim was brought now. That was what the District Court ruled, and we affirm the ruling of the District Court.

Again, a recording of this can be gathered from the Clerk's office if you need a transcript for purpose of further action.

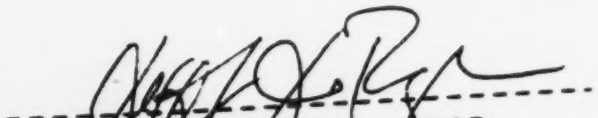
Thank you.

JUDGE MARTIN: Judgement was so entered.

Thank you both very much. We appreciate your presentations.

# CERTIFICATE

I, Jeffrey J. Rager, Official Court Reporter for the Court of Common Pleas, Cuyahoga County, Ohio, do hereby certify that as such reporter I took down in stenotype all of the proceedings had in said Court of Common Pleas in the above entitled cause; that I have transcribed by said stenotype notes into typewritten form, as appears in the foregoing Transcript of Proceedings; that said transcript is a complete record of the proceedings had in the trial of said cause and constitutes a true and correct Transcript of Proceedings had therein.



Jeffrey J. Rager, RPR,
Official Court Reporter
Cuyahoga County, Ohio

Supreme Court, U.S.
FILED
MAR 10 1995
OFFICE OF THE CLERK

(2)

No. 94-1154

# In the Supreme Court of the United States

OCTOBER TERM, 1994

JEANETTE MARIE GILLIES GRYBOS, ET AL.,
PETITIONERS

*v.*

DEPARTMENT OF STATE, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

DREW S. DAYS, III
*Solicitor General*

FRANK W. HUNGER
*Assistant Attorney General*

MICHAEL JAY SINGER
ROBERT D. KAMENSHINE
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*Department of Justice*
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BEST AVAILABLE COPY

16 pp

## QUESTION PRESENTED

Whether the two-year statute of limitations applicable to petitioners' suit under the Federal Tort Claims Act began to run in 1952, when the State Department cancelled petitioners' derivative U.S. citizenship, or in 1985, when a federal district court declared that petitioners were U.S. citizens.

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# In the Supreme Court of the United States

OCTOBER TERM, 1994

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No. 94-1154

JEANETTE MARIE GILLIES GRYBOS, ET AL.,
PETITIONERS

*v.*

DEPARTMENT OF STATE, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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### OPINIONS BELOW

The order and oral opinion of the court of appeals (Pet. App. 38-44) are unpublished, but the decision is noted at 36 F.3d 1097 (Table). The opinion of the district court (Pet. App. 32-36), adopting the Report and Recommendation of the Magistrate Judge (Pet. App. 1-31), is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on September 26, 1994. The petition for a writ of certiorari was filed on December 27, 1994 (a Tuesday following a Monday Holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioners are sisters whose father, John St. Clair Gillies, was born in Australia. Sometime before 1900, Mr. Gillies moved to the United States and became a naturalized citizen. Pet. App. 4. Mr. Gillies then moved to the Philippine Islands, where he married, raised a family, and became the owner and operator of a mining company. *Ibid.* During World War II, the Japanese interned Mr. Gillies and petitioner Grybos, "apparently because they were American civilians." *Id.* at 5. John Gillies was released after about seven months and taken to a hospital, where he died a few days later. *Ibid.* After his death, the Japanese retained his passport and other identifying papers. *Ibid.*

In late 1945, petitioners decided to move to the United States. Pet. App. 5. A U.S. government official held a hearing in the Philippines to determine if petitioners were American citizens. *Ibid.* The official was informed by the State Department that passports had been issued to a John Gillies who was a naturalized citizen from Scotland. Although that John Gillies was not petitioners' father, petitioners were allowed to enter the United States as citizens early in 1946. *Id.* at 6.

Problems with petitioners' citizenship status became apparent by 1952. Pet. App. 6. In a letter dated October 28, 1952, the State Department informed petitioner Grybos that it was refusing to issue a passport to her brother. *Ibid.* The letter explained that the Department had erroneously used the records of another John Gillies as the basis for admitting petitioners to the United States in 1945, and that the Department was unable to find any passport records for petitioners' father. *Id.* at 7, 17. In the letter, the State Department suggested that petitioners take prompt action to clarify

their citizenship status with the Immigration and Naturalization Service. *Id.* at 7. Petitioners were unsuccessful in subsequent attempts to convince the State Department of their American citizenship because they were not able to produce proof that their father was a naturalized American citizen. *Id.* at 7-8.

2. In 1982, petitioners filed suit in the United States District Court for the Northern District of Ohio, under 8 U.S.C. 1503, seeking a declaration of their citizenship status. Pet. App. 8. In a decision dated February 5, 1985, the court declared petitioners to be United States citizens. The court found from secondary evidence and witness testimony that petitioners' father was a naturalized American citizen at the time of his death, and that petitioners accordingly had acquired derivative citizenship through him. *Ibid.*

3. In February, 1987, petitioners each filed an administrative claim with the State Department under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346, 2671-2680, seeking damages for deprivation of their rights as United States citizens arising out of the government's allegedly negligent cancellation of the citizenship of their father, John Gillies, in 1952. Pet. App. 8-9. That cancellation had allegedly resulted in petitioners' loss of derivative citizenship, and, concomitantly, in the loss of their rights to travel abroad and to inherit John Gillies's mining rights in the Philippines. *Id.* at 2-3. On October 2, 1991, the State Department denied petitioners' claims on the ground that they were time-barred. *Id.* at 9.

4. On April 3, 1992, petitioners filed the instant suit in the United States District Court for the Northern District of Ohio, claiming that the government negligently revoked their citizenship. Pet. App. 9. The district court granted the government's motion to

dismiss petitioners' case on the ground that petitioners had not filed their tort claim with the State Department within two years after it accrued, and the claim therefore was barred by the applicable statute of limitations, 28 U.S.C. 2401(b). Pet. App. 12-13, 37.[1]

Applying the standard set forth by this Court in *United States* v. *Kubrick*, 444 U.S. 111 (1979), the district court held that petitioners' claim had accrued in 1952, when petitioners were informed of the revocation of their father's citizenship[2] and were refused U.S. passports, thus keeping them from visiting their relatives in the Philippines. Pet. App. 14, 17-18. At that time, petitioners knew that they had been injured, and knew who had inflicted the injury; thus, both prongs of *Kubrick*'s test were satisfied, and the statute of limitations began to run.[3]

The district court rejected petitioners' claim that they could not have filed the tort suit until after they obtained, in 1985, a declaration that they were U.S. citizens. Noting that petitioners had "known the essential facts about their injury for approximately forty

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[1] The district court adopted in full the Report and Recommendation of the Magistrate Judge to whom the case had been referred. Pet. App. 35.

[2] The district court apparently determined that the State Department's 1952 letter was tantamount to a revocation or cancellation of John Gillies's citizenship and, concomitantly, a cancellation of petitioner's derivative citizenship. Pet. App. 34, 35.

[3] Although the court was unable to determine from the record when petitioners learned that they would be deprived of their inheritance in the Philippines for lack of U.S. citizenship, the court found that point irrelevant. Pet. App. 18. It was sufficient that petitioners suffered a "significant and discernible" harm in 1952; it was not necessary for them to know the full scope of their injuries at that time. *Ibid.*

years" (Pet. App. 20), the court held that, while the ruling in the 1985 citizenship case was "helpful in clarifying the issues in this case, it was not a necessary predicate to [petitioners'] filing * * * suit" (*id.* at 20-21).[4]

The court distinguished *United States* v. *One 1961 Red Chevrolet Impala Sedan*, 457 F.2d 1353 (5th Cir. 1972), on which petitioners relied. Pet. App. 21. In that case, the Fifth Circuit held that the plaintiff's claim challenging a 1963 forfeiture of property had not accrued until 1971, when this Court decided a case holding that such a forfeiture was unlawful. 457 F.2d at 1358. Before the 1971 case, the plaintiff was not merely ignorant of his rights; he was "a plaintiff without a right." *Ibid.* The district court found *Red Chevrolet* distinguishable because the 1985 citizenship ruling did not establish a new cause of action—Congress had established the right to sue the United States in tort in 1949, and enforcement of

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[4] The court analogized the instant case to *Hohri* v. *United States*, 586 F. Supp. 769 (D.D.C. 1984), aff'd, 847 F.2d 779 (Fed. Cir.) (per curiam) (adopting district court's opinion), cert. denied, 488 U.S. 925 (1988). Pet. App. 19-20. In *Hohri*, the Federal Circuit rejected as time-barred an FTCA suit brought in the 1980s by survivors of this country's internment of Japanese-Americans during World War II. The plaintiffs in *Hohri* had argued that this Court's decision in *Korematsu* v. *United States*, 323 U.S. 214 (1944), holding that evacuation of Japanese-Americans was a military necessity, would have made it futile for them to bring their suit at the time of their injury in the 1940s, and that new information became available in 1982. See *Hohri*, 586 F. Supp. at 788. The Federal Circuit affirmed the dismissal of the plaintiffs' complaint because they had all the necessary information to file their suit in the 1940s—they knew they had been injured and who had injured them. *Id.* at 787. Although it might have been difficult to prevail in the face of *Korematsu*, it was not impossible. *Id.* at 788.

that right did not require a plaintiff to be an American citizen. Pet. App. 22.

The district court further noted that *Red Chevrolet* had recognized the need to interpret accrual "in light of the general purposes of the limitations statute and the practical ends to be served by the limitation of actions." Pet. App. 22. In this case, the court observed, the purposes of protecting the defendant and the courts "'from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence' * * * would not be especially well-served by allowing this case to go forward forty years after the operative facts occurred." *Id.* at 23 (quoting *Kubrick*, 444 U.S. at 117). As neither the government nor petitioners had produced any documentary evidence of John Gillies's naturalization, and the memories of witnesses would have faded significantly since 1952, allowing petitioners' suit to proceed would "defeat the purpose of and the protection afforded by § 2401(b)." *Id.* at 23-24.

Finally, the court rejected petitioners' reliance on the diligence-discovery rule, which postpones accrual of a cause of action "until the plaintiff has or with reasonable diligence should have discovered the critical facts of his or her injury." Pet. App. 24. The court reiterated that petitioners knew by 1952 the critical facts necessary to their claim—that they were injured by the cancellation of their father's citizenship, and that the State Department was responsible for that injury. *Id.* at 25-26, 27.[5]

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[5] The court concluded that two cases relied on by petitioners were inapposite. In *Barrett* v. *United States*, 689 F.2d 324 (2d Cir. 1982), cert. denied, 462 U.S. 1131 (1983), the FTCA statute of limitations was held to be tolled by the government's "intentional concealment of material facts relating to the Army's responsibility" in negligently conducting secret chemical warfare

5. The court of appeals unanimously affirmed. Pet. App. 38. Ruling from the bench after oral argument, Judge Boggs concluded that there was "no question" that petitioners knew of their injury and its source in 1952, and that the statute of limitations therefore began to run at that time. *Id.* at 41, 43.[6] The court held that there was no concealment within the meaning of prior cases that would lead to a tolling of the statute (*id.* at 41), and it distinguished *Red Chevrolet*, as did the district court: *Red Chevrolet* involved the recognition of an entirely new cause of action as a matter of law, while the instant case involved, "at most, a change in the ruling as a factual matter * * * by the U.S. District Court * * * which properly granted [petitioners] their citizenship." *Id.* at 42. Finally, the court cited *Hohri* in support of its ruling; in that case, the Federal Circuit held that "the statute of limitations began to run under conventional principles" even though plaintiffs were unlikely to prevail in light of adverse Supreme Court precedent. *Ibid.*

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experiments. *Id.* at 328. In this case, by contrast, the fact that petitioners' father was a naturalized citizen "was not a fact *concealed* by the State Department, but a fact *determined* by the federal district court." Pet. App. 26. In *Attallah* v. *United States*, 758 F. Supp. 81 (D.P.R. 1991), aff'd, 955 F.2d 776 (1st Cir. 1992), the plaintiffs could not have known until the conclusion of a federal law enforcement investigation that U.S. Customs Agents were responsible for the robbery and murder of plaintiff's courier. Pet. App. 26-27.

[6] In an apparent inadvertence, the court first referred to 1951 as the year in which petitioners' cause of action accrued. Pet. App. 41. The court later correctly identified the year as 1952. *Id.* at 43.

## ARGUMENT

All suits brought under the FTCA are subject to a two-year statute of limitations. 28 U.S.C. 2401(b).[7] This Court has held that a tort claim accrues under the FTCA as soon as the plaintiff is "in possession of the critical facts that he has been hurt and who has inflicted the injury." *United States* v. *Kubrick*, 444 U.S. 111, 122 (1979). The court of appeals correctly applied this settled principle of law.

The court of appeals determined that the two-year statute of limitations began to run in 1952, when the State Department revoked its earlier finding that petitioners' father was a naturalized citizen, denied petitioners' brother a passport, informed petitioners that they had been erroneously admitted into the United States, and advised them to take steps to clarify their citizenship status. Pet. App. 17. Petitioners became aware at that time of both their asserted injury (lack of recognition of their citizenship) and its cause (the refusal of the State Department to recognize their father's citizenship). No more was needed for petitioners to file the instant claim. See *Kubrick*, 444 U.S. at 123 (plaintiff "armed with the facts about the harm done to him" must make "reasonably diligent presentation of tort claims against the Government"); *Hohri* v. *United States*, 586 F. Supp. 769, 787-788 (D.D.C. 1984) (Japanese-American internees were aware during World War II that they lost their property as a result of the government's evacuation and internment program; information necessary to challenge government's military necessity

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[7] Section 2401(b) provides: "A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues."

defense was available shortly after war), aff'd, 847 F.2d 779 (Fed. Cir.) (per curiam), cert. denied, 488 U.S. 925 (1988).[8]

Petitioners claim that the Sixth Circuit erred in failing to recognize that the facts present a "continuing tort" and that petitioners' claim therefore "did not accrue until the date of the last tortious act, February 7, 1985." Pet. 10, 11-13. Although the adverse effects of the State Department's decision did continue at least until the district court recognized petitioners' citizenship in 1985, the alleged tort itself was complete when the State Department refused to recognize petitioners' derivative citizenship in 1952. See, *e.g.*, *Ward* v. *Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981) ("[a] continuing violation is occasioned by continual unlawful acts, not by continual ill effects from an original violation"; period of non-employment resulting from allegedly discriminatory actions did not constitute continuing tort); *Verner* v. *United States Government*, 804 F. Supp. 381, 383 n.2 (D.D.C. 1992) (negligent provision of medical services did not constitute continuing tort; veteran's FTCA claims time-barred). Petitioners had, in 1952, all the information needed to file an administrative claim. See, *e.g.*, *Lynch* v. *United States Dep't of Army Corps of Engineers*, 474 F. Supp. 545, 549 (D. Md. 1978) (FTCA claim accrued at time of Corps' alleged negligence in

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[8] Although the district court was unable to determine from the record when petitioners learned that they could not inherit their father's business interests in the Philippines, petitioners need not have known of that particular injury in order to bring a tort suit in 1952. See, *e.g.*, *Goodhand* v. *United States*, 40 F.3d 209, 212 (7th Cir. 1994); *K.E.S.* v. *United States*, 38 F.3d 1027, 1030 (8th Cir. 1994); *Federal Savings & Loan Ins. Corp.* v. *Haralson*, 813 F.2d 370, 377 (11th Cir. 1987).

1972, not in 1975 when Corps allegedly admitted the negligence), aff'd, 601 F.2d 581 (4th Cir. 1979).[9]

Finally, as the court of appeals recognized, the fact that the district court's 1985 order declaring petitioners to be U.S. citizens might have facilitated petitioners' tort claim does not mean that they were entitled to wait several decades for that order before pursuing the instant case. Assuming that a tort claim of this kind could properly be brought against the United States,[10] a district court could have considered, in the course of

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[9] The cases cited by petitioners (Pet. 11-12) stand for the legal proposition that, where there has been a continuing tort, the statute of limitations does not begin to run until the tort is complete. Those cases, however, do not support petitioners' contention that the facts presented here constitute a continuing tort, nor do those cases reflect any split among the circuits as to the definition of a continuing tort.

[10] Although the question whether such a tort claim would lie against the United States is not presented by this case in its present posture, petitioners would face significant legal hurdles in pursuing such an action. Under the FTCA, the United States may be held liable only "to the same extent [under applicable state law] as a private individual under like circumstances." 28 U.S.C. 2674. Thus, in *Akutowicz* v. *United States*, 859 F.2d 1122, 1126 (1988), the Second Circuit held that no FTCA action could be brought against the State Department for wrongful revocation of citizenship because "the withdrawal of a person's citizenship constitutes a quasi-adjudicative action for which no private analog exists." Additionally, the State Department's quasi-adjudication of a person's citizenship may possibly fall within the FTCA's provision that liability may not be "based upon the exercise or performance [of] * * * a discretionary function." 28 U.S.C. 2680(a); see *United States* v. *Gaubert*, 499 U.S. 315, 322-325 (1991) (discussing discretionary-function exception).

determining petitioners' negligence claim, whether petitioners were U.S. citizens.[11]

The asserted consequences flowing from the erroneous determination that petitioners were not citizens, which error was corrected by a district court in 1985, are indeed regrettable. Petitioners, however, apparently were in possession of all the information necessary to file a claim under the FTCA in 1952. The district court's 1985 ruling was not based on any newly discovered information, but instead rested on secondary evidence and the memories of witnesses that presumably would have been fresher in 1952. The purposes of the statute of limitations are therefore peculiarly implicated here, see *Kubrick*, 444 U.S. at 117, and the court of appeals correctly affirmed the dismissal of petitioners' untimely claim.

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[11] Petitioners argued below that they lacked standing to bring suit under the FTCA until they had been declared U.S. citizens. See Pet. App. 13. The district court found no basis for that claim (*id.* at 13 n. 3, 22), and petitioners do not raise it here. Even were that the case, however, petitioners had all the information needed to seek a declaration of their citizenship under 8 U.S.C. 1503 in 1952.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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